Supreme Court of the United States.

October Term, 1899.

No. 480.

Clarence Murphy, Plaintiff in Error,

v.

The Commonwealth of Massachusetts.

BRIEF FOR THE COMMONWEALTH.

Statement of the Case.

The plaintiff in error was indicted under Pub. Sts. of Massachusetts, c. 203, s. 40, and on May 28, 1896, was found guilty in the Superior Court on sixty-three counts, each of which, except two, charged him with the embezzlement of sums of money of more than one hundred dollars each, on different dates between July 19, 1892, and November 29, 1893, from the Salem Savings Bank, a corporation organized under the laws of Massachusetts and having its place of business in Salem in the County of Essex.

On May 29, 1896, he was sentenced under St. 1895, c. 504, for a term of not less than ten nor more than fifteen years' imprisonment in the state prison at Boston, one day thereof to be in solitary confinement and the residue at hard labor, and committed in execution of the sentence. On June 8, 1898, he sued a writ of error out of the Supreme Judicial Court of Massachusetts, and on January 6, 1899, that court reversed the sentence of the Superior Court, on the ground that the statute of 1895, c. 504, was unconstitutional so far as it related to past offences, and remanded the case to the Superior Court, under Pub. Sts., c. 187, s. 13, for sentence according to the law as it was when the offence was committed and before the statute under which he was sentenced took effect. The case is reported in 172 Mass. 264.

On January 7, 1899, he was brought before the Superior Court, pursuant to that decision, and resentenced according to the provisions of Pub. Sts., c. 203, s. 20, and Pub. Sts., c. 215, s. 23, the sentence being to the State prison for nine years, ten months and twenty-one days, the first day thereof to be in solitary confinement and the residue at hard labor.

Before imposing the last sentence, the court said that as he had already served one term of solitary confinement it would prefer not to resentence him to solitary confinement, if his counsel would file a written waiver thereof. The attorney stated that he did not feel justified in filing such a waiver; and thereupon sentence was imposed. The defendant excepted, and requested that all his rights be reserved, on the ground that he had already been in jeopardy for the same offence, and that the sentence abridged his privileges and immunities as a citizen of the United States and deprived him of his liberty without due process of law. The Supreme Judicial Court of Massachusetts overruled his exceptions, and the case comes to this court on error.

The plaintiff assigns as errors in the judgment and the sentence, the following:

(1) They are contrary to the provisions of the Constitution of the United States.

(2) They deprive him of his liberty without due process of law, contrary to the provisions of Article Fourteen of the Amendments of said Constitution.

(3) They abridge his privileges and immunities as a citizen of the United States, contrary to the provisions of Article Fourteen of the Amendments of said Constitution.

(4) They subject him to punishment under an *ex post facto* law, contrary to the provisions of Section Ten of Article One of said Constitution.

(5) By them he suffers punishment twice for the same offence and is placed twice in jeopardy therefor, contrary to Articles Five and Fourteen of the Amendments of said Constitution.

(6) By them he is compelled to suffer punishment under chapter 203 of the Public Statutes of Massachusetts, which the Supreme Judicial Court of Massachusetts has held since his conviction to

be not applicable to the punishment of his offence after the passage of chapter 504 of the Acts of the year 1895, and this although he has already suffered punishment under this latter act while it was still held applicable to his alleged offence.

(7) By them he suffers a punishment which has been substantially changed since his conviction, after he has once suffered punishment for the same offence under chapter 504 of the Acts of 1895, which was then applicable to his offence.

(8) By them he is compelled to suffer the punishment of solitary confinement twice for the same offence.

ARGUMENT.

Before considering assignments of error Nos. 4, 6 and 7, it may be well to refer briefly to the history of the case and to the decisions of the Supreme Judicial Court of Massachusetts bearing upon the subject.

Mass. St. 1895, c. 504, provides as follows: "When a convict is sentenced to the state prison . . . the court imposing the sentence shall not fix the term of imprisonment, but shall establish a maximum and a minimum term for which said convict may be held in prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offence of which he is convicted."

The offence for which the plaintiff in error stands convicted was committed before this act took effect.

The constitutionality of this statute was challenged in the case of *Commonwealth* v. *Brown*, 167 Mass. 144, which was argued and decided in 1896. So much of the opinion of Mr. Justice Holmes as relates to the statute in question is as follows:

"It is suggested, again without argument, that St. 1895, c. 504, under which the defendant was sentenced, is unconstitutional. This statute requires the sentence in certain cases to be for a term of not less than two and one-half years, and not more than a maximum fixed by the court, and not longer than the longest term fixed by law for the punishment of the offence. Such a sentence is in effect a sentence for the maximum fixed by the court, unless a permit to be at liberty is issued as provided by section two.

But the form of the sentence is made to recognize and carry out a policy familiar to our legislation and acted on heretofore without question. Such a form of sentence does not make the punishment more severe than it otherwise would have been, and we see no reason why the law should not be construed to apply to all sentences, in the cases referred to, passed after the act goes into operation."

The decision was rendered in November, 1896.

The only question, however, in that case was the constitutionality of the statute as an indeterminate sentence act, and no claim was made by counsel that if constitutional it was not applicable to offences committed before its enactment. The following words, therefore, in the portion of the opinion above quoted, to wit, "we see no reason why the law should not be construed to apply to all sentences, in the cases referred to, passed after the act goes into operation," are clearly *obiter dicta*, and cannot be regarded as authoritative.

The direct question as to whether the statute of 1895 was applicable to offences committed prior to its enactment was first raised by this plaintiff in the writ of error sued out by him more than two years after his original sentence, in which he claimed that he could not be sentenced under that act, and that as that act contained no express repealing clause of former statutes he could not be sentenced at all.

The question thus being directly raised, the Supreme Judicial Court of Massachusetts, in *Commonwealth* v. *Murphy*, 172 Mass. 264, held that the indeterminate sentence act did not repeal the former statutes as to offences committed before its enactment, and that the defendant should have been sentenced under such former statutes. In coming to this conclusion, the court, Morton, J., said (p. 266): "In *Commonwealth* v. *Brown*, the court says that it sees no reason why the statute should not be construed to apply to all sentences, in the cases referred to in it, passed after it went into effect. But it is evident that the attention of the court was directed more to the effect of the feature of indeterminate sentences upon the constitutionality of the statute than to other matters. The fact that the statute might interfere with his rights

or privileges in regard to a permit to be at liberty and was therefore objectionable, as *ex post facto* was not suggested in the defendant's brief."

The plaintiff in error was originally sentenced May 29, 1896, and remained in prison in execution of such sentence until January 7, 1899, when he was resentenced.

If the defendant in error appreciates the fourth, sixth and seventh assignments of error before this court, they are in substance that under the law, as declared in *Commonwealth* v. *Brown*, his original sentence was illegal, and that this decision having been overruled by the decision in *Commonwealth* v. *Murphy*, above referred to, the latter decision was in effect *ex post facto*, and that he could not be sentenced in accordance with it. But it is submitted that even if a decision of the court of last resort in a state be so far regarded as the law of the land that a subsequent decision overruling it is to be regarded as a change in the law (which the defendant in error does not concede), no such situation can be predicated of the decisions referred to.

It is scarcely necessary to say that *obiter dictum* is not a decision of the court, and is not binding either upon the court or upon the persons within its jurisdiction.

Cohens v. *Virginia*, 6 Wheat. 264, 399.

The question whether convicts whose crimes were committed before the passage of the indeterminate sentence act could be sentenced under that act was not raised by counsel, nor argued by them, nor directly determined by the court. The opinion of the court dealt directly and only with the question of whether the indeterminate sentence act was constitutional, as such, that being the only question before the court, and the remark of the learned justice above quoted had no reference to the decision and was not a necessary part of it.

The later case, therefore, cannot be said to have overruled *Commonwealth* v. *Brown*, but, at most, to have overruled a dictum of the court not necessary to the conclusion reached.

In *Commonwealth* v. *Crowley*, 168 Mass. 264, which may be relied upon by the plaintiff in error, it does not appear that the

question of whether the indeterminate sentence act could apply to previous offences was argued.

It would be carrying the doctrine of *ex post facto* legislation to its extreme to hold, in any event, that the overruling of a former decision by a court of last resort is a change in the law of a state within the meaning of the Constitution. And even if any such doctrine can be supported, it is certainly not applicable to decisions which merely explain and overrule *obiter dicta*.

Moreover, the defendant in error submits that the provision in the Constitution (Art. 1, s. 10) providing that "No state shall . . . pass any . . . *ex post facto* law," does not, was not intended, and cannot be properly held to apply or refer to the judgments of its courts. Such decisions are not laws passed by the state, but are merely declarations of the law, and if the court on reargument determines that its previous declarations are erroneous, the last declaration is not a change in the law, but, rather, a change in the construction to be given to the law by the courts.

"In order to come within the provisions of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only."

Gray, J., in Central Land Co. v. Laidley, 159 U. S. 103, 109.

It may also be said that even if the *dictum* of the court in *Commonwealth* v. *Brown* be held to be a law which could not be changed to affect the rights of the prisoner, it was not promulgated until after his sentence. The decision was in November, 1896, and the sentence was in May, 1896. If a decision is to be regarded, with reference to this clause of the Constitution, as a law of the state, it was not law until it was so declared by the court. The prisoner, therefore, was in execution of his first sentence before the law was declared, and continued to be so in execution of his sentence until after it was changed, if it could be said to be changed by the decision in *Commonwealth* v. *Murphy*. If the de-

cision was an *ex post facto* law, it was both made and repealed after his sentence; and he cannot now stand upon it.

The argument, therefore, that the plaintiff in error is now under sentence under an *ex post facto* law, in violation of the Constitution of the United States, is not supported by the facts, under any construction of the law.

The remaining assignments of error are, in substance:

(1) That the plaintiff in error has been twice put in jeopardy.

(2) That his privileges and immunities under the Fourteenth Amendment have been abridged.

(3) That he has been imprisoned without due process of law.

As to the last allegation, to wit, that the plaintiff in error has been deprived of his liberty without due process of law, the defendant in error submits that a recital of the provisions of the laws under and in consequence of which the plaintiff in error is now in confinement leaves no room for question that the allegation is not sustained.

The plaintiff in error was originally sentenced to a term of not less than ten nor more than fifteen years in the state prison, the first day to be in solitary confinement. He actually served, under this sentence, a period of two years, seven months and ten days. The resentence was for nine years, ten months and twenty-one days. The total amount of imprisonment under both sentences would be twelve years and six months. It was obviously the purpose of the justice, at the time of the resentence, to make the whole sentence equal to the average of the minimum and maximum prescribed by the first sentence. It will not be denied that the crime was within the jurisdiction of the court imposing sentence, that both sentences were within the limits of the statutes fixing the penalty for the offence of embezzlement, and that the total amount of both sentences was also within the same limit.

The crime for which the plaintiff in error stands convict was committed prior to the year 1895. He was originally sentenced in May, 1896. It is now conceded under the authority of *Murphy* v. *Commonwealth*, 172 Mass. 264, that the original sentence was error, and that he should have been sentenced, not under the inde-

terminate sentence act of 1895, but under the statutes as they stood before the passage of that act.

The plaintiff in error appears to have remained for more than two years content with his sentence. In May, 1898, he applied to the Circuit Court of the United States for a writ of *habeas corpus*. *In re Murphy*, 87 Fed. Rep. 549. This was denied him upon the obvious ground that the remedy of a writ of error was open to him in the courts of the state, who, upon a judgment of error, would be authorized to correct and revise the sentence.

The authority of the appellate court at common law, upon proceedings in error, in which it was determined that the original sentence was erroneous, to revise the sentence and render the judgment which the trial court should have rendered, is not wholly clear.

In *Commonwealth* v. *Ellis*, 11 Mass. 462, 466, it was said: "The general principle is well settled. If the judgment complained of was rendered by a court proceeding according to the course of common law, a writ of error lies, in which, in case of reversal, this court is authorized to render the same judgment as the court below ought to have rendered."

But in *Shepherd* v. *Commonwealth*, 2 Met. 419 (1841), it was held, that where there had been error in the sentence the court could not send a case back to the trial court to render a new judgment, nor could it render a new judgment, but could only annul the erroneous judgment and order the prisoner to be discharged.

It has been held, however, in various jurisdictions, that the appellate court has the right, when there has been an erroneous sentence, to remand the case to the trial court for sentence according to law.

Reynolds v. *United States*, 98 U. S. 145, 168, note.
In re Bonner, 151 U. S. 242, 259.
Roberts v. *State*, 30 Fla. 82.
Beale v. *Commonwealth*, 25 Penn. 11.
Henderson v. *People*, 165 Ill. 607.
Lowrey v. *Hogue*, 85 Cal. 601.

See also —

Brooks v. *Commonwealth*, 4 Leigh, 669.
Oliver v. *State*, 5 How. (Miss.) 14, 19.
Lynn v. *State*, 84 Md. 67, 83.
Harris's Case, 68 Vt. 243.
Papworth v. *City of Fitzgerald*, 156 Ga. 378.
Harrington v. *State*, 87 Ala. 1, 4.
State v. *Taylor*, 124 N. C. 803.
State v. *Williams*, 40 S. C. 373, 382.
Hathcock v. *State*, 88 Ga. 91, 99.
Graham v. *State*, 79 Wis. 651. Argued and decided after *in re Graham*, 138 U. S. 461.
United States v. *Pridgeon*, 153 U. S. 48, 63.
Coleman v. *Tennessee*, 97 U. S. 509, 519.
United States v. *Harmon*, 68 Fed. Rep. 472.

In view of the uncertainty as to the right of the court in case of erroneous sentence, and of the injustice of permitting a prisoner to go free in case the original sentence was erroneous, the Attorney-General of Massachusetts, in his report to the General Court for the year 1842, called the attention of that body to the decision of the court in *Shepherd* v. *Commonwealth*, *ubi supra*, saying that "fourteen convicts have already been liberated by the supreme court," and suggesting that a law should be enacted to enable that court in such cases "to pass such new judgment as justice and equity require." Attorney-General's Report of January, 1843, page 5. No action was taken by the Legislature, however, and *Shepherd* v. *Commonwealth* was virtually approved in *Sumner* v. *Commonwealth*, 3 Cush. 521. (1849).

The matter was again called to the attention of the General Court by the Attorney-General in his report for the year 1850. He said: "It is respectfully submitted that this doctrine is not in harmony with the theoretical perfection of the common law; and I think it can be successfully maintained that it was not originally a feature of that system. And the first case in which it was held in England is comparatively recent, and arose out of an error in

sentencing a party to transportation, when the law had affixed to the offence of which he was convicted, the punishment of death.

The natural repugnance of the judges, before whom a writ of error was brought, to correct the error by proceeding to a capital sentence, led them, *in favorem vitae*, into a departure from the true principles of the common law, by discharge of the prisoner.

This precedent has been followed in England and in some of the states of this Union, until the courts, by their adherence to it, are liable to commit more and graver errors than they correct."

"To restore this principle, so obviously an essential element in any well-considered, effective system of criminal jurisprudence, I respectfully suggest the expediency of providing by express enactment that whenever a final judgment in a criminal case shall be reversed upon a writ of error by the supreme judicial court, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had." Attorney-General's Report of February, 1851, pages 5 and 6.

The case in England referred to is *Bourne* v. *King*, 7 Ad. & El. 58.

Following his suggestion, the Legislature enacted the statute of 1851, c. 87, which is now Pub. Sts., c. 187, s. 13.

The statute referred to is as follows: "When a final judgment in a criminal case is reversed by the supreme judicial court on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had."

A similar statute had shortly before been enacted in England. St. 11 and 12 Vict., c. 78, s. 5. Similar legislation has been enacted in some other states.

The provisions of the statute have been applied in Massachusetts in *Jaquins* v. *Commonwealth*, 9 Cush. 279, and in *Commonwealth* v. *Haynes*, 107 Mass. 194, 198.

It was doubtless in view of this statute in Massachusetts that the circuit judge denied the writ of *habeas corpus*. Thereupon,

to wit, in June, 1898, over two years after his original sentence, the present plaintiff in error sued out a writ of error in the Supreme Judicial Court, alleging that the sentence of the Superior Court was erroneous, having been imposed under the provisions of the indeterminate sentence act, which took effect after the commission of the crime of which he was convicted. In this proceeding he availed himself of the provisions of Pub. Sts., c. 187, s. 9, as follows: "Writs of error upon judgments in criminal cases may be brought at any time after judgment is rendered, and may be entered in any county." This section is contained in the same chapter as the section before quoted, giving the right to the court on judgment of error to render such judgment as ought to have been originally rendered.

The court having adjudged the original sentence to be erroneous, thereupon remanded the case to the court in which the sentence was originally pronounced for resentence according to law; and it will not be denied that the sentence thereupon imposed was in accordance with the statutes in force before the enactment of the indeterminate sentence act of 1895.

It may be affirmed, therefore, that all the proceedings which resulted in the sentence of the prisoner, which he is now serving were in strict accordance with provisions of law which had long been in force in the Commonwealth of Massachusetts and in some other states of the Union, as well as in Great Britain Every step taken was in obedience to statutes which have been in force for nearly fifty years. The allegation, therefore, that he is deprived of his liberty without due process of law by the Commonwealth of Massachusetts, can be based only upon the proposition that the law is unreasonable, unjust, in derogation of his natural rights, and intended to operate as a hardship upon the individual.

It is too late to make such a claim. While it is undoubtedly true that the force of the Fourteenth Amendment is not destroyed by reason of the fact that proceedings under which rights are taken away are within the provisions of statute, yet if the proceedings are in accordance with the well-settled law of the jurisdiction, reasonable in their nature, and intended for the security, not only for the prisoner, but the community, and are in accord-

ance with the established usage and practice of the state, they are not affected by the provisions in question.

"Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Hurtado v. *California*, 110 U. S. 516, 537.
Hodgson v. *Vermont*, 168 U. S. 262, 272, 273.

"The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. . . . The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century, and make such changes as may be necessary."

Brown v. *New Jersey*, 175 U. S. 172, 175.

See also

In re Kemmler, 136 U. S. 436, 449.
Moore v. *Missouri*, 159 U. S. 673, 678.
In re Converse, 137 U. S. 624.

It is well settled that the Fourteenth Amendment does not pretend to secure to all persons in the United States the benefit of the same laws and the same remedies; but only that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

Missouri v. *Lewis*, 101 U. S. 22, 31.

The proceedings under which the plaintiff in error was resentenced, comprising, as they do, a writ of error granted to him under the statutes of Massachusetts, a judgment of the court

that error had been committed, and a remanding of the case to the trial court for judgment in accordance with the law, are designed not only to guard the prisoner's rights but as well to prevent that failure of justice which would be a denial of justice to the community. The prisoner had committed a great crime, for which he should be imprisoned. To permit him to go at large, would be injustice to the community. To require him to serve a sentence even technically wrong, would be a denial of justice to him. The statutes, therefore, permitting him to have the judgment corrected and permitting the state to have the judgment to which it is entitled, are not only not oppressive, unusual or arbitrary, but are designed to secure the fullest justice to all persons in the community and to the prisoner as well. They operate upon all alike, and are not only "due process of law," but a process of law as wise as it is possible for the ingenuity of man to devise.

The fact that the prisoner has already been in confinement for a substantial period under an erroneous sentence is not of consequence in this proceeding. If that was injustice, it is not the matter of his present claim, which refers not to his original sentence but to the sentence he is now serving. Nor was any substantial injustice done to him. All laws are made upon the presumption that the court will see to it that injustice is not done to the individual. In point of fact, the whole amount of the two sentences imposed by the trial court was twelve years and six months. This was the average of the minimum and maximum of the original sentence. Moreover, if under the forms of law injustice is done to a prisoner by the state, it is presumed that the sovereign body will make due recompense therefor in its own way. Whatever his wrongs may have been, they are not to be remedied by this proceeding.

Moreover, it is not unfair to the plaintiff in error to say that the substantial imprisonment he underwent under the original sentence was in consequence of his own laches. His right to a writ of error arose as soon as the sentence was pronounced, and the statutes of Massachusetts provide, in his favor, that the questions arising thereon shall be determined "without delay." Pub. Sts., c. 187, s. 9. The purpose of this provision was doubtless to give

the same rate of speed to writs of error as already existed in cases of *habeas corpus*.

It was also the right of the defendant to apply to the justices of the Supreme Judicial Court for a stay of proceedings on the original sentence. Pub. Sts., c. 187, s. 11. This the prisoner did not do.

He appears to have been content to let his sentence run on for more than two years, although it was within his power, not merely to shorten the period, but perhaps to be released upon bail, resting upon his rights in the hope, it may be, that thereby he might induce this court finally to take such action as would result in his not performing the sentence which was the just deserts of his crime.

It cannot be said that he was deterred from bringing his writ of error by the decision in *Commonwealth* v. *Brown*; for that case was not decided until eight months after he was originally sentenced.

It may be contended that he was compelled to undergo two periods of solitary confinement. It is a sufficient answer, however, to this suggestion, to say that the solitary imprisonment is not of itself a sentence, but is only a method provided for the carrying out of the sentence of the court. It is a necessary part of the sentence, but is not an additional sentence. It is within the discretion of the court, after having fixed the term of imprisonment, to make any part of such imprisonment, up to twenty days, solitary; the apparent purpose being, not an additional punishment, but to give the prisoner opportunity for reflection before entering upon the period of hard labor which comprises the remainder of his sentence. Moreover, both terms of solitary imprisonment have been completed. There is nothing in this respect to be corrected by any judgment of this court. He seeks relief in these proceedings, not from a sentence of solitary imprisonment, for that has been performed, but for discharge from further imprisonment.

It is apprehended that the principal contention of the plaintiff in error will be, that under the proceedings in the state courts he has been twice put in jeopardy, and that in this respect they are in

violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

There is no provision against a person being twice put in jeopardy in the Constitution of Massachusetts.

It is too well settled to require argument at this time that the Fifth Amendment to the Constitution of the United States, the only provision in that instrument directly forbidding the putting of a person twice in jeopardy, contains no restrictions on the powers of a state, but was intended to operate solely on Federal Government.

Brown v. *New Jersey*, 175 U. S. 172, 174; and cases cited.

The plaintiff in error, therefore, must base his contention as to this part of his claim solely upon the Fourteenth Amendment, and doubtless upon that part of the section which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The defendant in error does not propose at this time to enter into a discussion of the question whether the "privileges and immunities" in this amendment refer to the rights of citizens guaranteed under the first ten amendments of the Constitution, although in every case in which the question has been raised, it has been held by this court that such is not the meaning of the clause in question.

Slaughter-House Cases, 16 Wall. 36.
Spies v. *Illinois*, 123 U. S. 131.
In re Kemmler, 136 U. S. 436.

See also

O'Neil v. *Vermont*, 144 U. S. 323.
Hodgson v. *Vermont*, 168 U. S. 262.
Bartemeyer v. *Iowa*, 18 Wall. 129.
United States v. *Reese*, 92 U. S. 214.
United States v. *Cruikshank*, 92 U. S. 542.

The same section which prohibits a person being put twice in jeopardy (Fifth Amendment) also provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury."

In *Hurtado* v. *California*, 110 U. S. 516, the plaintiff in error had been proceeded against not upon indictment but upon information. If the contention of the plaintiff in error that the Fourteenth Amendment includes, as to citizens of the United States, the provisions of the Fifth Amendment, it certainly includes as well the right to protection from criminal proceedings excepting upon presentment of a grand jury. And it is at least significant that throughout the discussion of the case of *Hurtado* v. *California* there is no suggestion that the proceedings against him were unconstitutional for the reason that they were in violation of his "privileges and immunities" as a citizen of the United States.

It appears to be well settled that the privileges and immunities referred to in the Fourteenth Amendment were intended rather for the "protection of every citizen of the United States against hostile and discriminate legislation against him in favor of others, whether they reside in the same or in different states."

Field, J., in *Slaughter-House Cases*, 16 Wall. 36, 101.

But defendant in error submits that the plaintiff in error was not put twice in jeopardy, within the meaning of those words as used at common law and in the Constitution of the United States.

The maxim that no person shall be twice put in jeopardy is based upon the proposition that a judicial proceeding which has been lawfully carried to its conclusion, by a final judgment puts the seal of finalty on the controversies determined by that judgment. Jeopardy exists through every stage of the prosecution, as fixed by the existing laws relating to procedure, and while any stage of such prosecution remains undetermined the jeopardy has not been exhausted.

The term jeopardy "has no relation to the reversal of an erroneous judgment and pronouncing a legal one pursuant to a legal conviction."

McKee v. *People*, 32 N. Y. 239, 245.
State v. *Lee*, 65 Conn. 265.

The legal proceedings incident to the conviction of the plaintiff in error could not be said to have been finally ended until he had

availed himself of the privilege given him by the statute of taking out a writ of error. The same jeopardy continued, no less so than in cases where exceptions are overruled or motions for new trial are granted.

Consistent with the principle that when a controversy is finally determined it shall not be reopened, statutes authorizing re-trials and resentences have been in force from time immemorial. Even the right of the government to a new trial after a verdict of not guilty, has been upheld.

State v. *Lee*, 65 Conn. 265.
United States v. *Sanges*, 144 U. S. 310, 312, 318.

The writ of error sued out by the defendant was but a continuation, authorized by the statutes of Massachusetts, of the original proceedings against him, and the jeopardy which begun when a jury was impanelled and he was put to trial, did not, in contemplation of law, end until the final judgment upon the writ of error and sentence in pursuance thereof.

The privilege of error was his alone. It was his right to have accepted the original sentence, and having served it, to end his jeopardy, and thereupon to have been exempt from further proceedings.

Commonwealth v. *Loud*, 3 Met. 323.

The writ of error was no new instrument of prosecution instituted against him by the state. It was taken out by him in the exercise of his privilege, with knowledge of the provisions of the statutes providing for a correction of the original erroneous judgment. Such a correction of the sentence he must be deemed to have sought when he sued out his writ of error; and he could not be heard to object to the consequences attendant upon such a writ. The statutes of Massachusetts, and of other states, provide that a person may be sentenced notwithstanding the pendency of exceptions taken by him in the course of the proceeding of the trial. St. 1894, c. 469. The fact that such sentence is imposed, and the defendant is imprisoned during the pendency of the exceptions,

does not create, in case the exceptions are sustained, a new jeopardy or constitute a new invasion of the prisoner's rights.

For the purposes of the questions now raised, the case stands exactly the same as it would if the prisoner had sued out his writ of error on the day he was sentenced, as he might have done, and had procured a stay of the judgment under the provisions of the statutes authorizing the granting thereof, and remained at liberty until the determination of the questions raised by the writ of error. In such case, although there would have been two sentences imposed by the Superior Court, there would have been but one imprisonment.

The mere fact that, partly, at least, in consequence of his own laches, the prisoner served a portion of the erroneous sentence, in no way makes the proceedings after the writ of error a new jeopardy.

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